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YALE LAW JOURNAL

Published monthly during the Academic Year by the Yale Law Journal Co., Inc.
Edited by Students and members of the Faculty of the Yale School of Law.

SUBSCRIPTION PRICE, \$3.00 A YEAR

SINGLE COPIES, 50 CENTS

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TRIAL OF TITLE TO REALTY IN A PERSONAL ACTION

An interesting application of an old common-law doctrine in a civil law state is found in *Ducros v. St. Bernard Cypress Co.* (1918, La.) 82 So. 841.¹ The plaintiff sued for the value of certain timber which he alleged the defendant, in possession claiming title, had cut and removed from his land. The court held that the petition disclosed no cause of action since the plaintiff was in effect suing for a disturbance of possession, which he could not do where the defendant claimed title to the realty, until the question of ownership had been settled.

Though the majority of the court relied upon a state statute protecting the possession of even a wrongful possessor, the rule of the ancient common law was similar in the favor which was shown to the person who had acquired the seisin of land, even though he was not the owner thereof. It was early settled by statute² that there could be no dis-

¹ O'Neill and Provosty, JJ. *dissenting*.

² 5 Rich. II. 1381, ch. 7.

turbance of one's possession of realty, even by the rightful owner, but that the remedy was a trial of the title.³ So now generally the possessor has his remedy of an action of forcible entry and detainer against even the rightful owner for any disturbance of his possession.⁴ This leads to the further general holding that nothing short of a direct attack upon the title of the possessor will suffice, and that the title cannot be indirectly attacked in some other form of action. Thus, while a personal action such as trover will ordinarily lie for things actually severed from the realty, yet it is almost universally held that such action cannot be maintained when the defendant claims title to the realty.⁵ The courts usually content themselves by saying in justification of the rule that title to realty cannot be tried in a transitory action,⁶ though the real reason would appear to be the historical one above suggested, that the person in possession under claim of title was to all intents and purposes the owner until the real owner proved his superior title. It is, however, asserted that the rule is justified as preventing the useless litigation that would result if a suit might be brought for every blade of grass cut, instead of a single suit for eject-

³ Coke, *Littleton* (19th ed. 1832) *257a, note 1; Swift's *Digest* (Rev. ed. 1862) *510. The rule of the civil law was similar in that it protected the possessor against all except the person he had dispossessed, and against the latter after one year. *Dig. lib.* 43, tit. 17; Savigny, *Possession* (6th ed. Perry, 1848) 313, 314; 2 Mackeldey's *Roman Law* (Transl. Dropsie, 1883) pars. 240, 259, 263. This is in effect the provision of the Code of Practice, Art. 49, La. Rev. Civil Code, Art. 3456, relied on by the court in the principal case.

⁴ *Fults v. Munro* (1911) 202 N. Y. 34, 95 N. E. 23; see cases collected in 11 R. C. L. 1134ff.

⁵ *Anderson v. Halper* (1864) 34 Ill. 436, 85 Am. Dec. 318 (replevin); *Gunderson v. Holland* (1911) 22 N. D. 258, 133 N. W. 546 (replevin); *Hooker v. Latham* (1896) 118 N. C. 179, 23 S. E. 1004 (replevin and trover); *Pacific Live Stock Co. v. Isaacs* (1908) 52 Ore. 54, 96 Pac. 460 (trover); *Ruggles v. Sand* (1879) 40 Mich. 559 (trespass); *Robertson v. Rodes* (1852, Ky.) 13 B. Mon. 325 (action on the case); *Bigelow v. Jones* (1830, Mass.) 10 Pick. 161 (*indebitatus assumpsit*); *Parks v. Morris, Layfield & Co.* (1907) 63 W. Va. 51, 59 S. E. 753 (same); *Downs v. Finnegan* (1894) 58 Minn. 112, 59 N. W. 981 (same). *Contra*, *Illinois Cent. R. R. v. Ross* (1904) 26 Ky. L. Rep. 1251, 83 S. W. 635 (*assumpsit*). Though the point was not discussed the following cases also seem *contra*: *Single v. Schneider* (1869) 24 Wis. 299 (replevin); *Railway v. Hutchins* (1877) 32 Oh. St. 571 (trover); *Wetherbee v. Green* (1871) 22 Mich. 311 (replevin). *Curtis v. Deepwater R. R.* (1911) 68 W. Va. 762, 70 S. E. 776 (*assumpsit*) is distinguishable since there the parties had made an express contract for the sale of the timber. Cases are collected in 85 Am. Dec. 321; 5 C. J. 1389; 34 Cyc. 1365, 1367; and 38 Cyc. 2040. In Pennsylvania the rule is changed by statute in case of replevin. *National Transit Co. v. Weston* (1888) 121 Pa. 485, 15 Atl. 569. An extreme application of the rule is found in *Morgan v. Varick* (1832, N. Y.) 8 Wend. 587, where the plaintiff, having spent his six years in getting his ejectment action tried, was finally defeated in his trespass action because of the statute of limitations.

⁶ *Lehigh Zinc & Iron Co. v. New Jersey Zinc & Iron Co.* (1893, Ct. Err. & App.) 55 N. J. L. 350, 26 Atl. 920.

ment in which *mesne* profits might also be recovered.⁷ It seems to be a case where the old feudal rules of policy still persist and that, in order to prevent an endless clamor, we, too, should treat that man as owner who is in possession claiming to be owner, so long as no one else has proven a superior claim to that position.⁸ The rule does not apply in favor of a mere trespasser; there must be actual disseisin, that is, a *bona fide* claim of title by a defendant who is in possession of the realty.⁹ Nor does it apply to the decision of questions incidental to the trial of title, where the issue is not directly that of title, as for instance, where the question is whether or not the adverse possession has terminated before bringing of suit.¹⁰ In the principal case the plaintiff apparently was attempting to raise the issue of title,¹¹ and at first blush it would appear that the court was holding him to a technicality which would increase, rather than diminish, litigation. But the rules of policy seem sufficiently strong, so that the decision declining to consider the issue of title in this form of action is in reality more than the application of a rule of procedure, and is entirely justified.

Even after the issue of title is determined it is not settled just how far the owner can go in seeking redress, whether he is limited merely to a recovery of the *mesne* profits from the person who has been in wrongful possession, together with incidental damage to the realty, such recovery to be had in connection with the ejectment action, or thereafter in a separate suit, or is to be then permitted to recover things severed from the realty *in specie* or their value. The latter remedy has been denied against a disseisor, and *a fortiori* against his assignee, in the case of severed crops.¹² It has even been denied in the case of cut timber¹³ and of severed fixtures.¹⁴ It seems, however, to have been rather generally allowed in all cases except those of severed crops, i. e., *fructus industriales*.¹⁵ As to unsevered crops, there seems also to be no question; they go to the disseised owner no

⁷ *Powell v. Smith* (1833, Pa.) 2 Watts, 126.

⁸ For the analysis of the meaning of "ownership," see Cook, *Hohfeld's Contributions to the Science of Law* (1919) 28 YALE LAW JOURNAL, 721, 729, 730. Compare also the rule as to personalty that the possessor is considered as having title as against all but the true owner, COMMENT (1919) 29 YALE LAW JOURNAL, 91, 93.

⁹ *Davis v. Easley* (1851) 13 Ill. 192.

¹⁰ *Phelps v. Church etc.* (1900, C. C. A. 3d) 99 Fed. 683, 40 C. C. A. 72.

¹¹ See the dissenting opinion.

¹² *Jenkins v. McCoy* (1872) 50 Mo. 348; *Johnston v. Fish* (1895) 105 Calif. 420, 38 Pac. 979; *contra*, *Simpkins v. Rogers* (1854) 15 Ill. 397; *Thomas v. Moody* (1834) 11 Me. 139.

¹³ *Roberts Bros. v. Hurdle* (1849) 32 N. C. 490.

¹⁴ *Powell v. Smith*, *supra*.

¹⁵ *Page v. Fowler* (1870) 39 Calif. 412; *Stockwell v. Phelps* (1866) 34 N. Y. 363; *DeMott v. Hagerman* (1828, N. Y.) 8 Cow. 220.

matter by whom planted.¹⁶ It is submitted that the distinction drawn between *fructus industriales* when severed and other things, including *fructus naturales*, severed from the realty, is proper. Crops are largely the result of the care and labor put upon them and do not in any serious measure injure the freehold. It is just, therefore, that the owner should recover only the net gain.¹⁷ On the other hand, where things are severed to the permanent injury or depreciation in value of the freehold, there is no reason why ownership should be changed by the disseisor's wrongful act, and they should be recoverable to the same extent as any other objects of property. The principal case does not make it clear whether or not the court follows this rule, though a suggestion that it does may be found in the court's reference to a possibility of suit by the plaintiff after the termination of the adverse possession.

C. E. C.

LAST CLEAR CHANCE AND CONTRIBUTORY NEGLIGENCE

The question of whether the doctrine of last clear chance is an exception to the general rule of contributory negligence is again raised by the recent case of *Ellerman Lines, Ltd. v. H. and G. Grayson, Ltd.* (1919, Ct. App.) 121 L. T. Rep. 508. In this case the defendants, ship repairers, undertook to rivet cleats to the weather deck of the plaintiff's steamer. The rivets were heated on the weather deck and carried to an open hatch, through which they were lowered in a bucket to the "'tween" deck, where they were driven into the weather deck by a riveter. A cargo was being discharged from a hold below the "'tween" decks, and the hatch of both the "'tween" and weather decks being open, a cargo of highly inflammable jute was exposed through the hatches to anything falling from the weather deck. A boy in the employ of the defendants, carrying a red-hot rivet in a pair of tongs to the bucket, slipped on the deck, and the rivet fell through both hatches into the lower deck and set the jute on fire. The case was tried by the court without a jury. The court held that the defendants were negligent in doing their work in the manner described while the jute lay exposed, and (by two of the three judges) that, if the shipowners were guilty of contributory negligence (as to which the judges disagreed), then their negligence was not the proximate cause of the damage and did not prevent a recovery.

Clearly the defendants were guilty of negligence. Was the plaintiff guilty of negligence? And if so, did such negligence contribute to the injury, as an efficient cause between the parties, so as to bar a recovery by the plaintiff? The evidence showed that the plaintiff

¹⁶ *McGinnis v. Fernandes* (1890) 135 Ill. 69, 26 N. E. 109; *Craig v. Watson* (1881) 68 Ga. 114; *Freeman v. McLennan* (1881) 26 Kan. 151.

¹⁷ *Lindsay v. Winona, etc., Ry.* (1882) 29 Minn. 411, 13 N. W. 191.